Supreme Court U.S.
FILED
MAY 30 2002
OFFICE OF THE CLERK

No. 01-1607

IN THE

Supreme Court of the United States

DICO, INC,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONDENT CUSTOMER GROUP'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") empowers the United States Environmental Protection Agency ("EPA") to respond to releases or threatened releases of hazardous substances, to recover its response costs from defined classes of liable parties, and to order parties to perform response activities. *See*, 42 U.S.C. §§ 9604(a)(1), 9606(a), 9607(a)(4)(A). CERCLA authorizes any person to seek contribution from any other person who is liable for certain response costs, subject to the limitation that a person who has resolved its liability to the United States shall not be liable for claims for contribution regarding matters addressed in the settlement. 42 U.S.C. 9613(f)(1), (2).

In this case, EPA negotiated a Consent Decree resolving the government's CERCLA claims against five parties for the costs of cleaning up a contaminated site. The Consent Decree gives the settling parties protection from contribution claims for matters addressed in the Consent Decree. Petitioner, Dico, Inc. ("Dico"), who is the owner and operator of most of the site, and who boycotted the settlement negotiations, had contribution claims pending against the settling parties.

The questions presented are:

(1) Whether Dico had a vested property right in its CERCLA contribution action against the settling parties even though no final judgment was ever rendered in the matter.

(2) In the event Dico had a vested property right in that action, whether the District Court's approval of a Consent Decree that provided for contribution protection to the settling parties and extinguished Dico's contribution action constituted a taking without just compensation under the Fifth Amendment of the United States Constitution.

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

Dico, Inc. is the petitioner and was an intervenor before the District Court and the Eighth Circuit Court of Appeals.

The United States of America is a respondent and was a plaintiff before the District Court and the Eighth Circuit Court of Appeals.

BP Products North America, Inc., Chevron Chemical Company, Bayer Corporation, Pharmacia Corporation and Shell Oil Company (collectively, the "Customer Group") are respondents and were defendants before the District Court and the Eighth Circuit Court of Appeals.

Respondent BP Products North America, Inc. is wholly-owned by BP Company North America, Inc. and Standard Oil Company.

Chevron Chemical Company is an unincorporated division of Chevron U.S.A., Inc.

Bayer Corporation is owned by Bayer A.G.

Pharmacia Corporation has no parent corporation and no publicly held company owns 10% or more of Pharmacia Corporation's stock.

Shell Oil Company is wholly-owned by Royal Dutch Petroleum Company and "Shell" Transport and Trading Company, P.L.C.

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STATUTORY PROVISIONS INVOLVED

The provisions of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9657, relevant to this petition are reprinted in the Appendix at A-1 – A-5.

STATEMENT OF THE CASE

Respondents (the "Customer Group") are five companies who, after extensive negotiations with the United States Environmental Protection Agency ("EPA"), settled their alleged arranger liability under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 et seq., for contamination resulting from agricultural chemical formulation activities at the Des Moines TCE Site ("Site"). Petitioner, Dico, Inc. ("Dico"), the current and former owner and operator of the Site,[1] refused to participate in the settlement negotiations, and challenges the District Court's and the Eighth Circuit Court of Appeals's approval of the Consent Decree.

This matter began in the mid-1970s, when EPA learned of the presence of the hazardous substance trichloroethylene in the drinking water supply in Des Moines, Iowa. (Pet. App. 3a, 19.) The EPA determined Dico was the main source of this contamination. In 1989, other contaminants, including pesticides and herbicides, were discovered at and near Dico's property. Upon learning of the pesticide contamination, EPA divided the Site into four operable units ("OU"). Significantly, OU2 included the characterization of sources related to groundwater contamination and OU4 included the cleanup of pesticide and herbicide contamination in the soils and

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[1] Dico misleads the Court, claiming that it owned the property only for a "few months" during the operation of the formulating facility at the Site. (Petition for a Writ of Certiorari ("Petition") 19). Both the District Court and the Eighth Circuit determined that Dico's ownership goes back as far as 1941 or 1942, and Dico's predecessor, Di-Chem, operated the chemical formulation business at the Site until the early 1970s. (Petitioner's Appendix, ("Pet. App.") 3a, 20a, 31a n.6.)

buildings. (Pet. App. 20a.) OUs 1 and 3 involved Dico's contamination of the groundwater, and did not involve pesticides and herbicides.

Pursuant to Section 106 of CERCLA, 42 U.S.C. § 9606, EPA issued two unilateral administrative orders ("UAOs") (Pet. App. 3a, 20a, 41a), compelling Dico to perform two OU2/4 removal actions at the Site. Later, EPA negotiated an administrative order on consent ("AOC") with the Customer Group, which allegedly had sent raw technical grade product to the Site to be formulated into pesticides and herbicides. Under the AOC, the Customer Group agreed to perform another removal action relating to OU2/4. (Pet. App. 3a, 4a, 20a, 41a.) In addition to these activities, EPA performed a remedial investigation and feasibility study ("RI/FS") for OU2/4, oversaw the RI/FS and the work performed by Dico and the Customer Group, and evaluated the final remedy for OU2/4. As a result, EPA determined that long term operation and maintenance of the final remedy would need to be performed over the next thirty years. The total cost of performing cleanup activities at the Site was estimated by EPA to be about $8,605,620.

In 1997 Dico filed a lawsuit against the Customer Group, seeking joint and several cost recovery under CERCLA section 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B), contribution pursuant to CERCLA section 113(f)(1), 42 U.S.C. § 9613(f)(1), and a declaratory judgment under CERCLA section 113(g)(2), 42 U.S.C. § 9613(g)(2). (Pet. App. 41a-42a.) The Customer Group counterclaimed, seeking contribution from Dico for costs spent by the Customer Group in connection with the Site.

In 1998, EPA sent a Special Notice Letter to Dico and the Customer Group. (Pet. App. 4a, 21a, 42a.) At the time, EPA had significant unreimbursed costs relating to the work it performed at the Site for OU2/4. Additionally, no one had agreed to perform or fund the future operation

and maintenance at the Site. The Special Notice was accompanied by a Non-Binding Preliminary Allocation of Responsibility ("NBAR"), which is EPA's division of responsibility among the parties and is developed by EPA pursuant to CERCLA section 122(e)(3), 42 U.S.C. § 9622(e)(3).[2] (Pet. App. 4a, 21a.) The NBAR, which was based on numerous factors frequently considered by courts when performing an allocation under CERCLA, assigned the Customer Group a 39 percent fair share of liability for cleanup of the OU2/4 pesticide/herbicide contamination at the Site and Dico a 61 percent fair share. (*See* Pet. App. 7a, 21a.)

In response to the Special Notice Letter, the Customer Group submitted a good faith settlement offer to EPA and entered into settlement negotiations to resolve its entire liability for OU2/4 contamination at the Site. Despite at least three different direct invitations to participate in these negotiations, Dico declined to negotiate with EPA and refused to attend a single settlement session. (Pet. App. 21a-22a, 24a.) Instead, Dico informed EPA and the Customer Group that it would participate only if the settlement would also resolve its liability for OU1/3.[3] Because the Customer Group was implicated only with regard to OU2/4, and had no involvement whatsoever with OU1/3, Dico was informed by EPA that such a settlement was not being negotiated. In November 1999, EPA and the Customer Group entered into a Consent Decree. (*See* Pet. App. 53a-86a.) Meanwhile, in Dico's contribution action,

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[2] NBARs are used to expedite settlements. *See* 42 U.S.C. § 9622(e)(3)(A).

[3] As noted in Dico's Petition, EPA and Dico were in a dispute regarding EPA's ability to recover oversight costs for overseeing Dico's OU1/3 work. This issue was resolved in favor of the EPA in *United States v. Dico*, 266 F.3d 864, 880 (8th Cir. 2001), *cert. denied*, 2002 WL 341293 (U.S. May 28, 2002).

contrary to Dico's assertions (Petition, 3 n.2), Dico had not established a *prima facie* case for liability against the Customer Group, which vigorously defended the action. Instead, the *prima facie* elements of (1) whether the Customer Group members were "covered persons" under CERCLA section 107(a), 42 U.S.C. § 9607(a), as arrangers, (2) whether Dico's costs had been incurred consistent with the National Contingency Plan, and (3) whether Dico paid more than its fair share of recoverable costs, had yet to be determined by the District Court.

Under the terms of the Consent Decree, the Customer Group paid EPA $2,513,808 plus interest from when the Consent Decree was lodged. (Pet. App. 62a.) The figure paid by the Customer Group represented its 39 percent fair share of the *total* projected costs relating to the OU2/4 pesticide/herbicide contamination less costs already paid by the Customer Group in performing its removal action. It also included a settlement premium of $157,662 above the Customer Group's fair share to account for uncertainties associated with EPA's projections for future costs.[4] Of the money paid by the Customer Group, a portion of the costs went to EPA as reimbursement for its past costs. The rest of the money went into the Des Moines TCE Superfund Site OU2 and OU4 Special Account. These funds were, and are, to be made available to anyone who conducts a response action in connection with OU2/4 under an administrative agreement with EPA or pursuant to a written consent decree with the United States. After two years, money not already allocated is to be transferred to

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[4] Dico claims that the Customer Group "bought their way out of Dico's contribution claim by paying $2,513,808 plus interest" to the government. (Petition 4.) Given that this substantial figure represents the Customer Group's fair share, it is hard to imagine Dico's gripe. Obviously, the Customer Group would not pay its fair share of costs for the entire Site only to remain in litigation with Dico.

the general EPA Hazardous Substance Superfund. In return for its significant expenditure and its cooperation with the government, as set forth in CERCLA § 113(f)(2), 42 U.S.C. § 9613(f)(2), the Customer Group received contribution protection.

On March 10, 2000, EPA moved to enter the Consent Decree in the United States District Court, Southern District of Iowa, Central Division. Dico opposed the entry of the Consent Decree and sought an evidentiary hearing, which was denied. (Pet. App. 23a-28a.) After carefully considering all papers, including Dico's opposition and supporting documents, the District Court held that the Consent Decree was fair, reasonable, and consistent with the purposes of CERCLA, and entered the Consent Decree. (Pet. App. 28a-37a.) Specifically, the District Court determined that the Consent Decree was procedurally fair because negotiations were conducted at arms length, in an open fashion, with multiple invitations having been made to Dico to participate. Dico's repeated boycotts of all the settlement negotiations foreclosed any argument that it was treated unfairly. (Pet. App. 29a.) Also, the District Court held that the Consent Decree was substantively fair because the Customer Group's fair share of liability was based on factors frequently considered by courts when performing CERCLA allocations. (Pet. App. 30a-34a.) Finally, the District Court held that the Consent Decree was reasonable and consistent with the purposes of CERCLA because it ensured funds were available to complete the required work at the Site and allocated costs in a manner reasonably related to the actual percentages of fault. (Pet. App. 36a-37a.) The Customer Group timely paid EPA $2,513,808 plus interest.

Dico appealed the District Court's decision, claiming, *inter alia*, that the Consent Decree authorized an unconstitutional taking of its contribution claim against the Customer Group. The Eighth Circuit upheld the District

Court's approval and ruled that Dico never had a vested property right in its contribution action. (Pet. App. 9a-10a.) Dico then filed the pending Petition.

SUMMARY OF ARGUMENT

Dico argues that Congress intended to codify an unconditional common law right of contribution in CERCLA. Dico argues that its right to contribution against the Customer Group, as established by the common law, vested when EPA issued to it a Unilateral Administrative Order. Dico's arguments, which contradict the language of CERCLA, Congressional intent, and case law, are not compelling.

As initially enacted, CERCLA contained no provision expressly authorizing contribution actions among liable parties. However, numerous courts found that CERCLA provided an implied right of contribution. In 1986, Congress amended CERCLA to specifically authorize contribution actions. At the same time, Congress used its powers to limit this right of contribution by prohibiting contribution actions against anyone who entered into an administrative or judicially approved settlement with EPA. Thus, the CERCLA amendments superceded any unconditional common law right of contribution that may have existed, and control Dico's contribution rights against the Customer Group.

CERCLA does not create a vested right in Dico's contribution action. CERCLA explicitly states that the ability to seek contribution is at all times limited by the contribution protection afforded to settling parties. The legislative history of CERCLA's contribution section clearly expresses this intent: "The section also confirms a federal right of contribution or indemnification for persons alleged or held to be liable under section 106 or 107 of CERCLA *and prohibits the assertion of such rights against*

a party who has entered into a judically [sic] approved settlement with EPA." HR Rep. No. 99-253, pt. 1, 80 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2861 (emphasis added). No provisions of CERCLA support a contrary conclusion.

Moreover, even if one were to look to the common law, Dico's claim against the Customer Group did not vest. As CERCLA actions are actions among joint tortfeasors, Dico's claim cannot vest until a final judgment has been rendered, something that never happened in Dico's contribution case.

Finally, the extinguishment of Dico's claim is consistent with the purposes of CERCLA. Congress drafted CERCLA and its contribution provisions to encourage parties to be more willing to assume financial responsibility for cleanup and to settle with the government. The Customer Group cooperated with the EPA, agreed to perform cleanup activities, and negotiated a Consent Decree which required the payment of the Customer Group's fair share of liability as determined by the EPA of $2,513,808. In contrast, Dico had to be ordered to perform cleanup work and refused to attend a single settlement negotiation session. That contribution protection extinguishes Dico's contribution action against the Customer Group is entirely consistent with Congress's intent.

ARGUMENT

Dico refuses to believe that the same statute that gave rise to its contribution action against the Customer Group also can extinguish such claim. Dico would like the Court to re-write CERCLA to reflect its view of how the statute should operate. However, Dico can offer no compelling reason as to why the Court should even accept its Petition, let alone override Congress's clear intent.

Indeed, the present case meets none of the characteristics set forth in Supreme Court Rule 10 ("Rule 10"). Dico cannot point to any decision of any other court that either conflicts with the Eighth Circuit's ruling or otherwise offers support for Dico. Indeed, Dico cannot even point to language in CERCLA that supports its position. Instead, Dico has attempted to craft an argument based on what Dico insists was Congress's "true" intent in enacting CERCLA and its amendments.

In its attempt to create a conflict between the Eighth Circuit's decision and *something*, Dico posits that the Eighth Circuit's opinion (1) ignores Congress's intent to codify a common law contribution right that Dico believes vests when a potentially responsible party's ("PRP") liability under CERCLA is established in an administrative or court order; (2) subverts Congressional intent to enact a statutory scheme that protects contribution rights once they vest, despite CERCLA's clear statutory checks and balances on governmental settlement authority and power, and (3) sets a national rule that undermines a PRP's incentive to focus on prompt remediation first and on remediation costs second. (Petition 8.)

As set forth below, each of Dico's arguments fails. First, it is the clear language in CERCLA, and not Dico's distorted view of Congress's intent to codify the common law, that governs Dico's action. While on the one hand CERCLA permits parties to seek contribution from other PRPs, it also unconditionally provides parties that settle with the United States contribution protection. Thus, the unambiguous language of CERCLA limits Dico's ability to have a vested property right in its contribution action, if one would ever have existed. Second, even through the application of common law, Dico does not have a vested property right. Contrary to Dico's assertions, there was never a final judgment or other fixing of Dico's claim. In fact, currently Dico could not even maintain an action

against the Customer Group because the Customer Group has already paid more than its fair share of costs to resolve its liability at the Site, making the subject of contribution moot. Finally, the outcome obtained in the present action is consistent with CERCLA's intent to encourage voluntary settlements. That the recalcitrant Dico is displeased with the outcome only supports CERCLA's scheme to encourage parties to settle (like the Customer Group did) and discourage Dico's stubborn refusal to come to the table.

I. CERCLA, WHICH GOVERNS DICO'S CLAIMS, DOES NOT CREATE A VESTED RIGHT IN DICO'S CONTRIBUTION ACTION

Dico seeks to have the Court overlook CERCLA's statutory language and instead apply the common law to its action. This effort cannot succeed. Dico's contribution action against the Customer Group is brought pursuant to Section 113(f)(1) of CERCLA, 42 U.S.C. § 9613(f)(1). However, through a scheme designed to encourage voluntary settlements, this provision is limited by the contribution protection CERCLA explicitly affords to settling parties. Moreover, the irrelevant CERCLA provisions relied upon by Dico provide no support for Dico's position.

A. CERCLA CONTROLS DICO'S CONTRIBUTION ACTION

Dico seeks to go back in time to a period when CERCLA did not contain an explicit, but limited, right to contribution. Dico asks the Court to ignore the current language of CERCLA and instead apply Dico's rendition of the common law right to contribution. However, Dico's attempt to apply laws that long ago were superceded by Congress fails. The only law that is relevant to Dico's

contribution claim is CERCLA, as amended in 1986 by the Superfund Amendments and Reauthorization Act ("SARA"), Pub. L. No. 99-499, § 101, *et seq*.

As initially enacted, CERCLA contained no express provision to authorize a CERCLA PRP who had incurred cleanup costs to seek contribution from another PRP. *See, e.g., Key Tronic Corp. v. United States*, 511 U.S. 809, 816 (1994). Despite the lack of clarity in the statute, numerous district courts interpreting CERCLA held that such a cause of action existed. *Id.* However, the authority for such holding varied among the courts. Some courts indicated the right to contribution was expressly authorized by CERCLA, others found the right to exist by implication, and still others found the authority for the right to be federal common law. *See United States v. New Castle*, 642 F. Supp. 1258, 1262 (D. Del. 1986). Further clouding the issue and raising questions regarding the availability of contribution actions under CERCLA was the United States Supreme Court's holding in *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639-40 (1981), which refused to imply rights of contribution actions in other statutes absent express direction from Congress. *See United Technologies v. Browning-Ferris Ind.*, 33 F.3d 96, 100 (1st Cir. 1994).

In 1986, as part of the SARA amendments, Congress tackled the issue of contribution by establishing a scheme that expressly authorizes PRPs to seek contribution from other PRPs, but also encourages settlements with the government. Congress did this primarily by adding, side by side, the following two new key provisions.

Section 113(f)(1), 42 U.S.C. § 9613(f)(1), was added to state, in part:

> Any person may seek contribution from any other person who is liable or potentially liable [under CERCLA] .... Such claims shall be brought in accordance with this

> section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.

Section 113(f)(2), 42 U.S.C. § 9613(f)(2), was added to state, in part:

> A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

While section 113(f)(1), 42 U.S.C. § 9613(f)(1), cleared up the controversy regarding a party's ability to seek contribution under CERCLA, section 113(f)(2), 42 U.S.C. § 9613(f)(2), limited this ability as an incentive to encourage parties to enter into settlements with the government. As reflected in this section's legislative history:

> The section also confirms a Federal right of contribution or indemnification for persons alleged or held to be liable under section 106 or 107 of CERCLA and *prohibits the assertion of such rights against a party who has entered into a judically [sic] approved settlement with EPA.*

H.R. Rep. No. 99-253, *supra,* 1986 U.S.C.C.A.N. at 2861

(emphasis added).[5] It is the union of sections 113(f)(1) and (2) that governs Dico's contribution claim against the Customer Group and which clearly prohibits contribution actions against settling parties.

Dissatisfied with the results mandated by the statute, Dico now asks the Court to do something the Eighth Circuit refused to do: ignore the entire contribution scheme and incentives Congress explicitly inserted into the statute through the SARA amendments. Dico criticizes the Eighth Circuit, claiming its ruling erroneously and impliedly assumes that Congress created the right to contribution. (Petition 13.) Dico argues that the right to contribution was codified and clarified but was not created by Congress, since before the SARA amendments federal common law recognized an implied right of contribution. (*Id.*) In essence, it appears that Dico is asking the Court to perform an analysis not based on CERCLA, but rather on a common law right to contribution.

Dico's request finds no support in the law or in logic. Whereas Dico is asking that the Court find a vested right in the common law, any such right was superceded by Congress through the SARA amendments. *See Duke Power Company v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 88 n.32 (1978) ("Our cases have clearly established '[a] person has no property, no vested interest, in any rule of the common law.' . . . The 'Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law' . . . ."). Thus, even if Dico did have a vested right to contribution under the common law, which, as discussed below, it did not, such right was long ago nullified by the contribution scheme created by SARA. Dico's contribution action is governed

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[5] In quoting language from this portion of the Congressional Record in support of its argument, Dico failed to cite this paragraph, which negates its position. (Petition 22-23.)

only by CERCLA, as amended by SARA in 1986. As such, Dico's contribution claim against the Customer Group was extinguished when the Customer Group settled with the government and paid its fair share of remediation costs at the Site.

B. CERCLA DOES NOT PROVIDE DICO WITH A VESTED RIGHT IN ITS CONTRIBUTION ACTION AGAINST THE CUSTOMER GROUP

The Customer Group willingly cooperated with the government, paid its fair share of costs at the Site, and entered into a judicially approved Consent Decree with the EPA. This behavior is precisely what Congress intended in drafting CERCLA and the SARA amendments. In contrast, Dico twice had to be ordered by EPA to perform work at the Site and refused to participate in settlement negotiations regarding OU2/4. Dico's behavior is the behavior Congress sought to discourage through the various incentives codified in CERCLA. Dico now wants the Court to interpret CERCLA in such a way that it can "have its cake and eat it too" – refuse to settle, proceed with a contribution action against the Customer Group, and squeeze the settling Customer Group for more than what the District Court already deemed was a fair and reasonable settlement and consistent with the purposes of CERCLA. However, Dico can find no support for this tactic in CERCLA. Indeed, CERCLA sets forth a specific scheme to encourage parties to settle with the government while creating strong disincentives, including the extinguishment of contribution claims, to discourage parties from being recalcitrant.

Dico's displeasure, as manifest as it might be, does not provide the circumstances contemplated under Rule 10 for granting the Petition. While Congress's objectives and

the language of the statute may contravene Dico's agenda, they do not give rise to an unconstitutional taking, nor warrant the invalidation of the Consent Decree.

1. CERCLA's Contribution Protection Provision Prevents Dico's Action Against The Customer Group From Vesting

Congress made its intent to protect settlers from contribution claims clear: "A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement *shall not* be liable for claims for contribution regarding matters addressed in the settlement." 42 U.S.C. § 9613(f)(2)(emphasis added). The language is unambiguous and leaves no room for interpretation. That this provision can extinguish a CERCLA claim for contribution is evident by its very terms.

Dico attempts to pit the above provision against CERCLA section 113(f)(1), 42 U.S.C. § 9613(f)(1), which sets forth the ability of a PRP to seek contribution from another PRP. Dico tries to argue that this provision creates a vested right in a contribution action and that such right naturally "trumps" contribution protection. However, as set forth above, this provision merely states that PRPs are authorized to bring contribution actions against other PRPs, something that was not clear under the pre-amended statute. Nothing in the provision states that this is an unfettered, absolute, or vested right. In fact, Section 113(f)(1) states that contribution claims are to be brought "in accordance with this section." The very next provision of "this section" sets forth contribution protection. Such a juxtaposition was not by accident as revealed by this section's legislative history: "The section also confirms a Federal right of contribution . . . and prohibits the assertion

of such rights against a party who has entered into a judically [sic] approved settlement with EPA." H.R. Rep. No. 99-253, *supra*, 1986 U.S.C.C.A.N. at 2861. Congress clearly intended to place limits on the ability of a PRP to bring a contribution action against parties who have settled with the government, preventing Dico's contribution action from vesting.

2. No Other Provisions In CERCLA Indicate An Intent To Grant Dico A Vested Interest In Its Contribution Claim

Dico cannot point to a single section of CERCLA that would suggest Dico, a recalcitrant who had to be ordered to perform cleanup activities at the Site, has a vested interest in its contribution claim against the Customer Group.

a. CERCLA Section 308 Does Not Apply To Judicially Approved Settlements

Dico argues that CERCLA section 308, 42 U.S.C. § 9657 shows Congress's intent to codify a contribution right capable of rising to the level of a vested, constitutionally-protected property right. Section 308 states, in part:

> If an administrative settlement under section 9622 of this title has the effect of limiting any person's right to obtain contribution from any party to such settlement, and if the effect of such limitation would constitute a taking without just compensation in violation of the fifth amendment of the Constitution of the United States . . . such limitation on the right to obtain contribution

> shall be treated as having no force and effect.

However, this provision has no application to the present facts. The Customer Group received contribution protection pursuant to a judicially approved, and not an administrative, Consent Decree. In order for the court to enter the Consent Decree, it first made a finding that the Consent Decree was fair, reasonable, and consistent with the purposes of CERCLA. (*See* Pet. App. 28a-37a.) *See also United States v. Union Electric Co.*, 132 F.3d 422, 430 (8th Cir. 1997). The District Court made these determinations based on a careful reading of the parties' supporting and opposition papers. The Eighth Circuit, after consideration of the briefs, the record and oral argument, upheld these findings. (Pet. App. 13a-16a.)

Because CERCLA section 308 applies only to administrative settlements, and not to Consent Decrees having the procedural safeguards associated with judicially approved settlements, this section is irrelevant to Dico's arguments. The Court need not try to hypothesize scenarios in which CERCLA section 308 may come into play.

b. The Statute of Limitations Has No Application To When Dico's Contribution Claim Becomes A Property Right

Dico repeatedly claims that the statute of limitations set forth in CERCLA section 113(g)(3), 42 U.S.C. § 9613(g)(3), dictates that it has a vested property right in its contribution action. Without any authority cited, Dico purports that CERCLA's statute of limitations was intended to coincide with the vesting of its claim. (Petition 18-19.) Thus, Dico argues that the statute of limitations and the vesting of its contribution action occurred on the same day.

Dico's argument fails for two reasons. First, other than Dico's hopeful hypothesis, Dico offers no factual or legal support for its conclusion; no support for its argument can be found in (1) any provision in CERCLA, (2) the congressional record, or (3) any case law interpreting CERCLA. Dico pulls this argument from the air. Second, Dico is mistaken in identifying the appropriate statute of limitations. No statute of limitations is specified for contribution actions based on UAOs. CERCLA section 113(g)(3), 42 U.S.C. § 9613(g)(3), provides:

> No action for contribution for any response costs or damages may be commenced more than 3 years after-
> (A) the date of judgment in any action under this chapter for recovery of such costs or damages, or
> (B) the date of an administrative order under section 9622(g) of this title (relating to de minimis settlements) or 9622(h) of this title (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

CERCLA does not specify the statute of limitations applicable to actions for contribution based on work performed pursuant to a UAO issued under CERCLA section 106, 42 U.S.C. § 9606.[6] Certainly, if Congress intended to link the vesting of Dico's claim to a statute of

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[6] The statute of limitations applicable to Dico's action is the subject of debate among the courts. *Compare, Sun Co., Inc. v. Browning-Ferris, Inc.*, 124 F.3d 1187, 1191-92 (10th Cir. 1997), *cert. denied*, 522 U.S. 1113 (1998) (holding that absent a triggering event under section 113(g)(3), the limitations set forth in section 113(g)(2) apply) *with Reichhold Chemicals, Inc. v. Textron, Inc.*, 888 F. Supp. 1116, 1125 (N.D. Fla. 1995) (holding absent a triggering event no statute of limitations applies).

limitations period, it would have at least specified when the claim vests or when the statute of limitations applicable to the claim accrues. Here, Congress has done neither. Once again, Dico's argument has no merit.

II. EVEN UNDER COMMON LAW DICO'S CONTRIBUTION ACTION AGAINST THE CUSTOMER GROUP DID NOT VEST

Although CERCLA clearly sets forth the rights and limits for parties to obtain contribution under that statute, even under an analysis of the common law, Dico's action did not vest. CERCLA contribution actions are actions between joint tortfeasors. *See, e.g., Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1303 (9th Cir. 1997) ("As is the case traditionally in contribution actions between tortfeasors, CERCLA's claim for contribution creates several only liability among PRPs."). Under common law, contribution actions between joint tortfeasors do not vest until there is a final, unreviewable judgment, which there has not yet been in this case. *See Hammond v. United States*, 786 F.2d 8, 11, 12 (1st Cir. 1986) (analyzing United States Supreme Court decisions and holding rights in tort do not vest until there is a final, unreviewable judgment); *see also In re TMI*, 89 F.3d 1106, 1113 (3rd Cir. 1996) ("[A] pending tort claim does not constitute a vested right.").

Dico tries to argue that its right to contribution vested when EPA ordered it to perform work pursuant to the UAOs. Dico claims that at this point its claim became "fixed." Dico's argument fails for two important reasons.

First, Dico erroneously relies on numerous non-tort related cases in which the court held a cause of action vested before a final judgment. (Petition at 17, 18.) These cases actually support the long-established law that a cause of action in tort, such as contribution among joint

tortfeasors, does not vest until a final judgment has been rendered. For instance, in a case relied on by Dico, *Ettor v. City of Tacoma*, 228 U.S. 148, 157 (1913), the Court took great pains in distinguishing the case from one in tort. *Ettor*, 222 U.S. at 157-58 ("In the instant case the action is neither for a tort, nor for a penalty, nor for a forfeiture, but for injury to property actually accomplished before the repeal of the law under which the street was graded which required compensation to be made.").

Second, contrary to Dico's assertion, by its nature, a CERCLA contribution action cannot be "fixed" until a final judgment has been rendered. Under common law as well as CERCLA, a party bringing a contribution claim may not recover until it can prove that it has paid more than its fair share of the common liability. *See, e.g., Pinal Creek Group*, 118 F.3d at 1298; *Blasland, Bouck & Lee, Inc. v. City of North Miami*, 283 F.3d 1286, 1302 (6th Cir. 2002). At the time the UAOs were issued to Dico, Dico's claim could not be fixed because its fair share of the total liability had not been ascertained and could not be ascertained until a judgment was rendered.

Both the District Court and the Eighth Circuit rejected Dico's false claims regarding the level of its contribution to Site remediation costs yet, remarkably, the same exaggerations surface again in the Petition. (Petition 2, 25.) Indeed, despite its repeated inaccurate assertions that Dico paid 90 percent of the response costs, the facts demonstrate Dico paid a much smaller fraction of the total costs associated with work performed at the Site. (Pet. App. 16a.) In addition to the work Dico performed under the UAOs, the Customer Group performed a removal action pursuant to the AOC, EPA performed various investigations and oversaw all the work performed at the Site, and EPA determined that extensive operation and maintenance would have to be performed to ensure the long-term effectiveness of the remedy.

The total costs of all work at the Site were estimated to be $8,605,620, with Dico paying no more than its judicially approved fair share. The Customer Group paid the remainder – its fair share of 39% of total cleanup costs (plus a premium). The conclusion, then, is obvious – having paid no more than its fair share, Dico has no contribution claim, vested or otherwise. There is no conspiracy here, as Dico suggests, to rob Dico of something it is entitled to. The Customer Group has paid its fair share and is done. No contribution claim against it can be maintained. CERCLA's statute recognizes this logic and codified it in Section 113(f)(1) and (2). Dico cannot be deprived of something it never had.

III. THE PURPOSES OF CERCLA ARE FURTHERED THROUGH THE EXTINGUISHMENT OF DICO'S CLAIM

The extinguishment of Dico's claim against the Customer Group is precisely what Congress intended when drafting the SARA amendments. Congress drafted CERCLA sections 113(f)(1) and (2) with the purpose of encouraging settlements. As noted by Congress, section 113(f)(1) was intended to encourage private parties to "be more willing to *assume* the financial responsibility for some or all of the cleanup if they are assured that they can seek contribution from others." H.R. Rep. No. 99-253, *supra*, 1986 U.S.C.C.A.N. at 2862 (emphasis added). Section 113(f)(2) was intended to bring a measure of finality to settlements involving cooperating parties, such as the Customer Group, protecting "[r]esponsible parties who have entered into a judicially approved good faith settlement under the Act [] from paying any additional response costs to other responsible parties in a contribution action." *Id.* As numerous Circuit Courts have recognized, under these provisions, "PRPs who choose to settle gain

protection from contribution, enjoy potentially favorable settlement terms, and retain the ability to seek contribution from other defendants. Those responsible parties who choose not to settle are barred from seeking contribution from the settling parties and thereby face potentially disproportionate liability." *Bedford Affiliates v. Sills*, 156 F.3d 416, 427 (2nd Cir. 1998) (citations omitted).

Dico's current fate is precisely what Congress intended when adding sections 113(f)(1) and (2) to the statute. Dico, an owner and operator at the Site during pesticide formulation, and a current owner/operator at the Site, refused to step up and assume responsibility for cleanup costs.[7] Only after EPA ordered Dico to perform cleanup under two UAOs did it perform any work at the

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[7] Dico's reliance on *United States v. Charter Int. Oil Co.*, 83 F.3d 510, 518 n.11 (1st Cir. 1996) to support its position that Congress should not extinguish a claim of a party that incurred costs pursuant to a UAO is misplaced. (Petition 25.) In *Charter*, the court warned that later settlements should not be so broad as to extinguish contribution claims of early "*settlors*." *Charter* 83 F.3d at 518 n.11. Dico, who refused to cooperate with the government and had to be ordered to perform work at the Site, can hardly be considered a "settlor." Likewise, *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761 (7th Cir. 1994) is inapposite. *Akzo* involved the scope of contribution protection when the consent decree was silent. The court looked to the type of work that formed the basis of the contribution action and the scope of work covered in the consent decree to determine the parties' intent. The court held the Consent Decree at issue did not preclude the contribution action in that case. However, it indicated that contribution protection would have applied had the Consent Decree been more clearly worded. *Akzo Coatings*, 30 F.3d at 766. Here, the Customer Group paid its fair share of *all* costs relating to Site cleanup and Dico does not dispute that the scope of contribution protection is clear in the Consent Decree and encompasses its contribution action. Most importantly, the issue raised in *Akzo*, the scope of the contribution contained in the Consent Decree, is not before the Court.

Site which it owned.[8] Indeed, Dico even refused to participate in settlement negotiations with EPA and the Customer Group[9] involving the funding of future operation and maintenance that will take place on Dico's *own* property.

In contrast, at every stage the Customer Group cooperated with EPA. The Customer Group entered into an AOC with EPA to perform a removal action at the Site. It also entered into settlement negotiations with EPA to resolve all its liability at the Site by paying its fair share of the *total* predicted costs for Site cleanup and future operation and maintenance plus a settlement premium to account for uncertainties associated with the future costs. The money paid by the Customer Group was to be used for reimbursing EPA for its costs, including its costs of overseeing the work performed by Dico, and to assure funding for long term operation and maintenance at the Site. As found by the District Court and the Eighth Circuit, the Consent Decree was fair, reasonable, and consistent with the purposes of CERCLA. The Customer Group is the

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[8] Dico argues that the UAO process is much more desirable for the government than a negotiated settlement: "It obtains immediate remediation of the Site by a private party, without having to compromise, negotiate, or incur costs . . ." (Petition 16.) However, Dico downplays that EPA's oversight costs (which were hundreds of thousands of dollars in the present case) are not covered through the UAO process. EPA must seek them through litigation, which is avoided in the settlement process.

[9] Dico has argued that it did not participate in negotiations because it did not view EPA as "neutral" due to its dispute with EPA over EPA's ability to recover oversight costs with regard to OU1/OU3. (Petition, p. 3 n.3.) Of course, Dico's view was pure speculation since it boycotted the numerous negotiation sessions to which it was invited. Had Dico attended the negotiations, it might have been able to effect changes to the Consent Decree. Dico now has only itself to blame for its displeasure over the terms of the final Consent Decree and the contribution protection that accompanies it.

quintessential party that Congress intended to provide with contribution protection. That Dico, who refused to assume responsibility for cleaning up the Site and would not even participate in settlement negotiations, lost its contribution action against the Customer Group, shows that Congress's incentives to encourage parties to settle work. Perhaps next time Dico or another similarly situated person is implicated at a site it will more readily cooperate with EPA.

IV. CONCLUSION

Dico's gripe is with Congress and not the Judiciary. The fact that Dico's contribution claim has been extinguished as a result of the contribution protection afforded to the parties who entered into a judicially approved Consent Decree is entirely in line with the language and intent behind CERCLA. Dico has made no showing whatsoever that the result in this case is inconsistent with Circuit Court authority, or a statute or a constitutional provision. As the circumstances surrounding Dico's issues bear no resemblance to those contemplated under Rule 10, the Customer Group respectfully requests that the Court deny Dico's Petition for a Writ of Certiorari.

Respectfully submitted,

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May 30, 2002

APPENDIX A

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42 U.S.C. § 9604(a) [CERCLA § 104(a)]

(a) Removal and other remedial action by President; applicability of national contingency plan; response by potentially responsible parties; public health threats; limitations on response; exception

(1) Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time (including its removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment. When the President determines that such action will be done properly and promptly by the owner or operator of the facility or vessel or by any other responsible party, the President may allow such person to carry out the action, conduct the remedial investigation, or conduct the feasibility study in accordance with section 9622 of this title. No remedial investigation or feasibility study (RI/FS) shall be authorized except on a determination by the President that the party is qualified to conduct the RI/FS and only if the President contracts with or arranges for a qualified person to assist the President in overseeing and reviewing the conduct of such RI/FS and if the responsible party agrees to reimburse the Fund for any cost incurred by

the President under, or in connection with, the oversight contract or arrangement. In no event shall a potentially responsible party be subject to a lesser standard of liability, receive preferential treatment, or in any other way, whether direct or indirect, benefit from any such arrangements as a response action contractor, or as a person hired or retained by such a response action contractor, with respect to the release or facility in question. The President shall give primary attention to those releases which the President deems may present a public health threat.

42 U.S.C. § 9606(a) [CERCLA § 106(a)]
(a) Maintenance, jurisdiction, etc.

In addition to any other action taken by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require. The President may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.

42 U.S.C. § 9607(a)(4)(A),(B) [CERCLA § 107(a)(4)(A),(B)]
(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date
Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section -

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for -

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

42 U.S.C. § 9613(f)(1),(2) [CERCLA § 113(f)(1),(2)]
(f) Contribution

(1) Contribution

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such

equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.

(2) Settlement

A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

42 U.S.C. § 9613(g)(3) [CERCLA § 113(g)(3)]

(3) Contribution

No action for contribution for any response costs or damages may be commenced more than 3 years after -

(A) the date of judgment in any action under this chapter for recovery of such costs or damages, or

(B) the date of an administrative order under section 9622(g) of this title (relating to de minimis settlements) or 9622(h) of this title (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

42 U.S.C. § 9622(e)(3)(A) [CERCLA § 122(e)(3)(A)]

(A) In General

The President shall develop guidelines for preparing nonbonding preliminary allocations of responsibility. In developing these guidelines the President may include such factors as the President considers relevant, such as: volume, toxicity, mobility, strength of evidence, ability to pay, litigative risks, public interest considerations, precedential value, and inequities and aggravating factors.

When it would expedite settlements under this section and remedial action, the President may, after completion of the remedial investigation and feasibility study, provide a nonbinding preliminary allocation of responsibility which allocates percentages of the total cost of response among potentially responsible parties at the facility.

42 U.S.C. § 9657 [CERCLA § 308] Separability of provisions; contribution

If any provision of this chapter, or the application of any provision of this chapter to any person or circumstance, is held invalid, the application of such provision to other persons or circumstances and the remainder of this chapter shall not be affected thereby. If an administrative settlement under section 9622 of this title has the effect of limiting any person's right to obtain contribution from any party to such settlement and if the effect of such limitation would constitute a taking without just compensation in violation of the fifth amendment of the Constitution of the United States, such person shall not be entitled, under other laws of the United States, to recover compensation from the United States for such taking, but in any such case, such limitation on the right to obtain contributions shall be treated as having no force and effect.